

Rev. John Brewer
9903 Ponder Lane
Louisville, KY 40272
March 22, 2006

Attn: Connie Verrill
Kentucky Registry Of Election Finance
140 Walnut Street
Frankfort, Kentucky 40601-3240

Dear Ms. Verrill,

I hereby ask, as per KRS 121.135, for an official advisory opinion related to my proposed **use of a contest** for the primary purpose of creating a relatively small incentive to display political advertising.

As a form of advertising, the use of contests (herein denoted the "contest method") to motivate a constituency to promote a product is well known and documented. The contest itself is not the end, but a means to an end. That is, it facilitates the process of communication to the consumer. The contest itself is incidental to the marketing aim.

Local radio and television media have long used an application of the "contest method" that encourages the listening audience to display some form of logo specific message -- *most often the stations call letters and a slogan* -- on a bumper sticker, window decal, or a rear-view mirror hanger. In exchange, the persons who participate become eligible to win. Often, the scenario for winning is that the participant must be spotted displaying the item in public. Upon spotting, the participant is then eligible to win cash and/or prizes. Does this sound familiar? It should. It routinely happens throughout the whole United States as an expression of free speech put to commercial use. And what happens when it comes time for business entities to document these contests for tax purposes? They are recorded as **advertising expenses**.

So, the question becomes, "Does a citizen lose this conduit of free speech when he becomes a candidate for office?" Does a candidate have an equal right to advertise in a similar way that other entities, other citizens do? Are the free speech rights of the candidate lost or somehow compromised simply because he runs for office? The legacy of applicable law would argue otherwise.

If the "contest method" is invalidated to a candidate, what are we to make of the myriads of raffles with door prizes and other contests which regularly feed political campaigns? There is certainly a much stronger connection between voters and candidates at a private fund raiser than would be seen in a completely random drawing involving hundreds, if not thousands. Does anyone accuse these candidates of "vote buying"? Why not? Could it be that the veil of random selection, even on a small scale, protects the candidate from being accused of purchasing votes?

Since the contest in question stands accused of possible violation of the "vote buying" statute, it is helpful to briefly examine KRS 121.055, which states : **"No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration**

of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract.” Several critical aspects of this statute should be highlighted in this case:

- 1) No candidate for nomination or election – It applies to candidates.
- 2) shall expend, pay, promise, loan or become liable in any way for money or other thing of value, either directly or indirectly – It applies to candidate’s commitment of money or some other thing of value. **This, obviously, must be taken in context.** Candidates may “expend, pay, promise, loan or become liable in any way for money or other thing of value, either directly or indirectly” when such a commitment is made “primarily in support or opposition to a candidate.” (cf. - KRS121.175, KRS121.180(10), and 32 KAR 2:200)
- 3) to any person; with any person – This is the red flag noted by some when an individual receives payment. Yet, this too **must be taken in context**, both within the statute itself and the body of election law. These phrases do not restrict a candidate from incurring normal obligations and making the required payments. It would be absurd to imagine that a candidate should not have to pay for services used, including advertising, that were rendered at his request. It is not sufficient, therefore, to blindly stop at this point in assessing “vote buying”.
- 4) in consideration of the vote or financial or moral support of that person; in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention – “Consideration” is possibly the key element of this statute. It implies a **contract, implicit or explicit, must take place in order for “vote buying” to occur.** Contract law, to my recollection, requires an offer to be made and an acceptance to that offer. Without both parts, there is no contract. Furthermore, “consideration”, or something of value, must be exchanged as part of any valid contract acceptance. Finally, **the one accepting the contract cannot unilaterally change the terms of the offer, even if consideration is theoretically offered.** Practically speaking, this means that if I offer to sale my boat and you accept and give me a deposit (consideration), then you cannot subsequently change the terms of the offer and say that because you gave me consideration you are now buying my house.

In summary, it is not “vote buying” just because money is paid to an individual. There must be an implicit or explicit contract where the elements involved must fulfill contractual law.

Salient facts taken from attached Exhibit A, flyer:

- 1) the contest is a random (*implied*) drawing, with the results unable to predicted
- 2) a decal with the brewer campaign logo is to be distributed to residents in district 28 (or roughly zip codes 40272, 40258, 40214 as indicated in flyer)
- 3) a relatively small amount of money is used as a variable reward to facilitate distribution of decal
- 4) persons who frequent district 28 are also eligible
- 5) persons who live in district 28 who are less than age 18 may be eligible
- 6) “non-partisan nature of this contest” is asserted
- 7) “no participant is under any obligation whatsoever to vote for any candidate”
- 8) “this contest is conducted as political advertising”
- 9) this contest has the usual earmarks of most other contests, with a reasonable number of rules and disclaimers

The proposed contest plainly states that "no participant is under any obligation whatsoever to vote for any candidate" (*emphasis added*). This explicit statement as part of the offer betrays any idea that voters will be rewarded for their vote – "vote buying". The offer, contractually speaking, would have to be changed either implicitly or explicitly. There is no other indication in this offer that gives a contrary statement. In fact, quite the opposite:

- 1) It is a random drawing, without the ability to predict recipients. It would be difficult to relay such an implicit change of offer.
- 2) It is stated within the disclaimers that one reason for disqualification could be for violating the "non-partisan nature of this contest".

If this offer were aimed at "buying votes", then why would it allow "persons who frequent district 28" to be eligible along with district 28 voters? What would be the point? If these contestants won, they could not be eligible to vote in district 28. That would be a pretty foolish way of spending "vote buying" money. Likewise, persons who live in district 28 who are less than age 18 also may be eligible to win. What? How would that help buy votes? Ineligible voters being allowed to be contestants? What could this mean? Let me suggest the answer: **"this contest is conducted as political advertising"** (as stated in the disclaimer).

I want to conclude my defense of the proposed contest by saying that a relatively small amount of money is used as a variable reward to facilitate distribution of the decal. This is important. I have been told that the cost of one mailing in my district would be around \$3000. The total expense of prizes is \$2225. Add to this the expense of the decals and various flyers promoting the contest and it may approach the cost of two mailings - maximum. That does not seem unreasonable to me from a candidate/business point of view. It has the potential to communicate to thousands of my constituents in a vibrant meaningful way. Perhaps if I was giving away \$100,000 and every tenth person was a winner, maybe you could say that there was undue influence. However, the amounts involved, the random nature of the contest, and the eligible contestants simply do not lead to that conclusion. It is advertising, plain and simple.

While I am sensitive to the need to safeguard the electoral process, innovative political advertising, like all other forms of free speech, deserves to be protected.

Sincerely,



Rev. John Brewer
candidate for state representative in the 28th district

PS.> Attachments

As exhibit A, I submit the attached flyer for your consideration. This flyer gives the scope and breadth of a proposed contest aimed at innovative political advertising. It is a final draft copy.

As exhibit B, I submit the previous authorization of the concept by Heather Jennings, Administrative Spec. I. This was given on October 12, 2005. At this time I was assured that the concept was legal by your office. It was seen as an "incentive" similar to a "door prize" for participation. I was told that so long as there was no exchange of gifts or cash for votes (no

expectation, no **quid pro quo**) that it was legal. I have followed up with the final draft to your office, not because I expected problems, but out of respect. Now, after we are ready to launch this initiative, I am being advised that I should seek an advisory opinion – with the tainted suggestion that this somehow represents “vote buying”.

Finally, it should be noted that no other authority, local or state, could find any objection in law or ordinance. The local County Attorney’s office and the local Inspection, Permits, and Licenses (IPL) office both were consulted on March 20th and 21st, respectively. In addition, the state’s Office of Charitable Gaming was consulted, with a conclusion on March 21st by Director Alan Wagers that such a contest had “no charitable gaming aspect to it” and was not “charitable gaming” - hence not subject to any violation of charitable gaming laws.

Cling-for-Cash

Wouldn't it be great to win cash simply by placing a window decal on you car?

Now you can. The **BREWER** campaign "bumper sticker" has now been made into a vinyl decal that adheres to your car window by static cling. No mess. No fuss. No scraping. Just place it on your car window and get set to win! Who said politics can't be fun?

Monthly drawing of \$100, \$50, & \$25. Grand Prize of \$1000 on Nov. 3, 2006!! NO PURCHASE NECESSARY TO WIN. Call 212-9921 to enter.

Rules

- 1) Each contestant must provide the following information:
 - a) full name of each vehicle owner (or homeowner's name) b) complete home address
 - c) phone number d) number of vehicles registered
- 2) a) Decal must, at all times, be clearly visible on each vehicle registered. b) Vehicle(s) must be licensed and have current county registration decal. c) Each vehicle with the Brewer decal gives the contestant another chance to win.
- 3) The winner of a drawing must provide proof that all vehicles which are registered are currently displaying the decals. Winners will receive a phone call after a drawing, and at least one attempt will be made to visit the home, find the vehicles, and give a selection ticket. If the winner and vehicles are unable to be found after reasonable effort within 24 hours of the drawing, another person will be selected for the prize.
- 4) a) Contestants may be as young as 16* with a valid driver's license. b) Contestants must be from the 40272, 40258, and 40214 zip codes unless they can establish that they frequent the 28th legislative district on a regular basis.
- 5) a) Drawings will be held the last Friday of April, May, June, July, August, September, and October of 2006. A first prize of \$100, second prize of \$50, and third prize of \$25 will be selected monthly. In November, the Grand Prize drawing will be held on November 3, 2006 at 7 PM. It will award a \$1000 cash prize. All monthly winners, previous selectees, will be awarded their prizes at this time also. b) Contestants must be registered by 6 PM on the last Wednesday of April, May, June, July, August, September, and October of 2006 to be eligible for a particular month's drawing. Contestants must be registered by 6 PM, Wednesday, October 25th, 2006 for the Grand Prize drawing. c) All winners are eligible to win again until the contest ends. d) Winners will be selected impartially and before witnesses. Brewer family and campaign staff are not eligible for contest. Winners will be recognized each month on the Brewer Campaign website, <http://28FORWARD.net>. For more info., call 212-9921.
- 6) **Special Grand Prize rule** -- Each contestant will have their chance of winning multiplied according to the following formula: **(# of months registered as a contestant) X (# of vehicles registered).**
In other words, it pays to register as many eligible vehicles as possible AND to register as soon as possible.

Disclaimers

- 1) Contest sponsored by Campaign Fund for John K. Brewer, known herein as the Brewer Campaign --mailing address of P.O. Box 72864, Louisville, KY. Entry constitutes permission to post winner's name on the Sponsor's website. **Contest void where prohibited.**
- 2) By accepting any prize, winner agrees that Sponsor, its affiliates, volunteers, advertising and promotional agencies and suppliers and all of their respective officers, directors, employees, representatives and agents shall have no liability for, and shall hold all such parties harmless against damage, loss or injury that may arise in whole or in part, directly or indirectly, from the acceptance, possession, use or misuse of prizes or participation in this Contest. All taxes are the responsibility of the winner.
- 3) a) Sponsor may prohibit entrants from participating in the Contest and disqualify entries if they attempt to enter the Contest through means not described in the rules, attempt to disrupt the Contest or circumvent the rules, act in an un-sportsmanlike manner or with an intent to annoy or harass any other entrant or Sponsor. Sponsor reserves the right to cancel or suspend the Contest should virus, bugs, unauthorized human intervention, or other causes beyond the control of the Sponsor or Promoters, corrupt the administration, security, fairness, integrity, or proper operation of the Contest. All decisions are final. Sponsor makes no warranty, representation or guarantee, express or implied, in fact or in law, relative to the use of the Contest prize including, but not limited to, quality, merchantability or fitness for a particular prize. b) Sponsor reserves the right to disqualify any contestant(s) who, in the Sponsor's opinion, abuse the non-partisan nature of this contest.
- c) No contestant shall have an unqualified right to enter this contest. Potential contestants may be subject to time and material availability constraints of the Brewer Campaign. d) This contest may be unilaterally canceled by the Brewer Campaign if it is determined to be in violation of any local, state, or federal ordinances. In such a case, any subsequent obligation to contestants shall be nullified.
- 4) a) By participating, entrant agrees to abide by these official rules and disclaimers as well as the decisions of the Sponsor, which are final and binding in all respects. b) Entrants agree that any and all claims, disputes and causes of action arising out of or related to the Contest shall be resolved, without resort to any form of class action, exclusively by the appropriate courts in Jefferson County, Kentucky in accordance with the laws of the State of Kentucky, without giving effect to conflict of law rules which would cause the application of the laws of any other jurisdiction.
- 5) * All contestants between the ages of 16 and 18 must have parental/guardian consent to enter. If a winner has not reached the age of legal majority in his/her home state, then the prize will be awarded in the name of his/her parent or legal guardian. Such winner shall retrieve prize from parent or guardian as allowed by law.
- 6) No participant in this contest is under any obligation whatsoever to vote for any candidate. Furthermore, no participant, by virtue of entering this contest, is under any obligation to support any campaign morally or financially. -- This contest is conducted solely as political advertising and has been vetted by various state and local agencies. For a complete listing, see Sponsor's website. No known federal, state, or local laws regulating contests have been violated.

Paid for by John Brewer for State Representative

This phrase will be pasted on all flyers

Exhibit B

October 12, 2005

John Brewer may give an incentive to someone displaying a yard sign, bumper sticker, etc... as long as the incentive is not tied to a contribution or in lieu of someone's vote.

Heather Sunnings

Admin. Spec. I

Registry of Election Finance
